United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1259

To be argued by
Paul E. Warburgh, Jr.

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P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,

against

ANTHONY CONTRERAS, et al,
Defendants-Appellants.

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On Appeal From The United State District Court
For The Eastern District of New York

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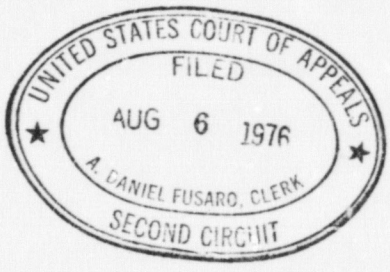
BRIEF FOR THE APPELLANT, ANTHONY CONTRERAS



Paul E. Warburgh, Jr.
Attorney for Appellant
122 East 42nd Street
New York, N.Y. 10017

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PRELIMINARY STATEMENT

Anthony Contreras appeals from a judgment entered in the United States District Court for the Eastern District of New York (Platt,J.) on June 4th, 1976, convicting him of theft of goods travelling in interstate commerce, in violation of Section 659 , Title 18, U.S.C., possession of goods stolen while travelling in interstate commerce and of conspiracy to steal and possess goods stolen while travelling in interstate commerce in violation of Section 371, Title 18, United States Code.

The indictment charged Contreras in count one with theft of goods stolen while travelling in interstate commerce in count two with possession of the goods; and in count five with conspiracy to steal and possess the goods. Three other defendants, DiGiso, Berrada, and Dominici were also charged in the same or other counts of the indictment.

After an eight-day trial before Judge Platt, the jury found Contreras guilty of stealing goods while travelling in interstate commerce (count one); possession of goods stolen while travelling in interstate commerce (count two); and conspiracy to steal and possess goods while travelling in interstate commerce (count five). DiGiso was found guilty of all counts in which he was named. Berrada was found guilty of counts three, four and five, and not guilty of counts one and two. Dominici was acquitted of all counts in which he was named.

On June 4, 1976, the district court sentenced

Contreras to three concurrent five year terms of imprisonment.

STATEMENT OF FACTS

GOVERNMENT'S CASE

On April 27, 1973, at about 3:00 am. Thomas Tavolacci, appellants Joseph DiGiso and Anthony Contreras, and Albie Strauss met at the home of Dorothy Graziano located on East 3rd Street in Brooklyn (52-55). The meeting had been arranged earlier for the purpose of assembling to look for a truck to hijack (56-57). From the Graziano house the men proceeded in two cars, a 1969 blue Chevelle and a rental car, toward the Verrazano Bridge. They parked in the vicinity of 65th Street so they could see the Brooklyn-Queens Expressway and waited for a truck. As they waited a United Merchants truck en route from South Carolina carrying textile piece goods proceeded slowly over the Verrazano Bridge toward the Brooklyn-Queens Expressway (447-455).[1] The truck entered the Brooklyn-Queens Expressway and passed by 65th Street where it was seen by the four men. After seeing the truck they entered the Brooklyn-Queens Expressway and followed it to Church Street Trucking Company (447) at Church and Worth Streets in Manhattan (61).

The truck backed into the building there and at that point Tavolacci approached it, pulled out a gun and told the drivers, Hoyt Shead, and Guy L. Snell, that he was taking the truck (61, 448-449). The drivers were placed in the rear

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1 Guy L. Snell, driver testified that the hijackers commented that the truck must have been carrying a heavy cargo because it slowed as it climbed the Verrazano Bridge from the New Jersey side.

of the Chevelle which was being operated by Contreras. The two drivers, Tavolacci and Contreras then left the truck and drove through the Brooklyn Battery Tunnel on to the Southern State Parkway (62,451). They drove as far as Exit 34 then turned around and proceeded back into Brooklyn where the drivers were released. During the ride Tavolacci observed a ship coming into New York Harbor and commented about it (542). In addition Tavolacci and Contreras talked about a man named Andrew and at one point Tavolacci referred to Contreras as Tony (453-454).[2]

While the truck drivers were being driven around the truck was taken to Harris' Department Store in Montclair, New Jersey (65) and the load was delivered to Bernard Mass. Prior to the delivery Mass has been contacted by a person named Jim or Jack concerning the purchase of dresses and pants (362).[3]

The truck arrived at the department store at about 8:30 am. and Mass was told by the driver thatthe load was for him. Mass had been expecting mens pants but accepted the load of piece goods anyway. Strauss assisted Mass and the driver in unloading the truck (375-379).[4]

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2 Snell seeing only the back of the head and one quarter profile was not able to identify the driver of the car (454).

3 Jim or Jack had been referred to Mass by Ray Barske (362, 882-885). Jim or Jack was not appellant DiGiso.

4 DiGiso did not participate in the delivery and unloading of the truck (407).

After the delivery had been made Mass talked to Jim or Jack and was informed that the wrong shipment had been delivered (380). Mass said he did not want the material but later agreed to purchase it (382). Thereafter Mass gave the driver who made the delivery a partial payment (383) and arranged for his father, Emanuel Mass, to pay the balance (384-385).[5]

Several weeks after the delivery Mass received a telephone call from DiGiso and at a meeting offered to sell Mass a quantity of mens work jackets. Mass declined the offer because he didn't deal in them.[6]

On May 7, 1973, another meeting was held at the Graziano house (71). Present were Tavolacci, DiGiso, Contreras and Andrew Berrada (72). This meeting also had been prearranged for the purpose of going out to hijack a truck. (71). All four men left in the Chevelle (73) and drove around for a few hours looking for a truck. (72). As they were ready to give up they saw a Cooper Motor Line's Truck parked on Hamilton Avenue in Brooklyn (72). The truck, driven by Sam Brown who was 6'7 tall, had come from South Carolina. As Mr. Brown was returning to his truck after asking directions he was approached by Tavolacci and

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5 Tavolacci testified that he accompanied DiGiso to the Harris Department Store several days later when DiGiso collected part of the money (66-67). Mass never identified DiGiso as a person to whom money was paid and in fact said that if Tavolacci had said that DiGiso collected some of the money that Tavolacci was either mistaken or lying (409-410).

6 An objection to this testimony was overruled (393).

Contreras (73, 563-564).[7] Tavolacci displayed a gun; told Mr. Brown that they were taking the truck, and placed him in the back seat of the Chevelle (565-566). They drove away and DiGiso and Berrada took the truck (74).

Brown was driven around for about 3½ hours and then released (568). During the ride Tavolacci referred to Contreras as "Tony" (568).

Later that day DiGiso told Tavolacci that the load could not be sold and had been abandoned (74-75).

In the early morning hours of May 29, 1973, Tavolacci, Strauss, DiGiso and Berrada met at Dorothy Graziano's house (76). They left shortly thereafter in two cars, the blue Chevelle and Strauss' car and drove to Manhattan in the vicinity of Canal Street and Broadway (77). There, at the Harry Semmell Company was a Cooper Motor Lines truck which had just arrived from South Carolina with drivers Sam Brown and Ralph Owens (569-570). Tavolacci approached the truck and at gun point ordered both drivers out (78, 571-572). He then escorted the drivers to the blue Chevelle which Berrada was driving and placed them both in the back seat (78, 573). They drove away and about 3½-4 hours later the

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7 Brown described Tavolacci as having sandy red hair, weighing 185-200 lbs., being 5'10"-5'11" in height, and 36-42 years old with a rough completion. He described Contreras as being 5'6" tall and having black hair graying at the sides. Brown never saw his face because of sunglasses that he was wearing (564-565, 589). Brown was not able to identify Contreras as being one of the hijackers (575)

drivers were released.[8]

While the drivers were being driven around DiGiso and Strauss took the truck.

Thereafter DiGiso arranged to sell the contents of the truck, yarn, to Robert Tribulsi, at Vanguard Knits in Brooklyn for 75¢ a pound (280). The yarn was delivered a day or two later (283) and thereafter Tribulsi paid DiGiso $3,000.00 (284).[9]

Several weeks later Tavolacci and Berrada decided that Robert Dominici would participate in the next hijacking instead of Contreras or Strauss (86). Thereafter on June 28th Tavolacci, Berrada, DiGiso, and Dominici met at the Graziano residence and then left to hijack a truck. They drove to the area of the Verrazano Bridge where they spotted a Carolina Mills truck driven by Bill Eades and Charlie Hartzoge (87). Tavolacci and the others followed the truck to the Nassau Tape and Webbing Company on Flatbush Avenue in Brooklyn, (87, 627, 633). As the truck stopped to make a delivery (628) Tavolacci went up to the truck and ordered the drivers out and placed them in the rear of a blue Chevelle

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8 At the trial Mr. Brown was unable to make anin court identification of any of the defendants as being participants in either of the hijackings (575). Because of this he was permitted to testify that after the hijackings he selected from an array of photographs Contreras and Berrada as both having eyes similar to the eyes of hijacker No. 2 in the second hijeacking, namely May 29th. This was the only basis for his selection.

9 Tribulsi testified that on one occasion Berrada accompanied DiGiso when he went to Vanguard Knits. (289).

which Dominici was driving (88, 628).[10] The drivers were told to keep their eyes closed and they were driven around until released about four hours later.

After the Chevelle had left DiGiso and Berrada took the truck (89).

A few days later the contents of the truck which was another quantity of yarn was delivered to Vanguard Knits where it was stored (288) because it was not readily saleable since it was an unpopular type (288).

About two weeks later on July 16th Tavolacci was arrested in connection with another case (90). At the time of his arrest he was in the company of Contreras and both of them together with DiGiso had just returned from an unsuccessful attempt to locate a truck to hijack (99-100).[11]

In August, 1973, Tribulsi received a visit from Special Agent Colgan of the Federal Bureau of Investigations who was inquiring about stolen yarn (296). After receiving permission agent Colgan searched the premises of Vanguard Knits and found nothing. A few days later Tribulsi destroyed the yarn that he was storing and told DiGiso about agent Colgan's visit and the fact that he destroyed the yarn. He also indicated that he was frightened and DiGiso told him not

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10 Eades and Hartzoge were unable to identify Dominici during the trial but did testify the driver of the car was big, about 250 lbs and had long black hair (630, 635).

11 The testimony of Tavolacci was permitted over objection and its admissability was limited to those defendants named as similar acts with reference to the substantive counts and as part of the proof with reference to the conspiracy count (98).

to worry. Agent Colgan returned again some time later and during the conversation with Tribulsi, Tribulsi told him that he wanted a lawyer (301). After this Tribulsi called DiGiso and DiGiso told him again not to worry.

In 1975 after Tribulsi was subpoenaed before the grand jury he called DiGiso and DiGiso told him that he was being given a hard time by the people and to say that he knew nothing (301-305).

ANTHONY CONTRERAS'CASE[12]

On April 27, 1973, at 5:15 am. a United Merchants truck carrying unfinished piecegoods arrived at the Church Street Trucking Company to make a delivery. The truck operated by drivers Hoyt Shead and Guy Snell had come from Langley, South Carolina.

Shortly after arriving and while waiting for the company to open, a man appeared at the door of the truck, exhibited a gun and said, "Get out of the truck, I am taking it". Shead was told to wake Snell who was sleeping and to take his personal belongings. Shead and Snell got out of the truck and were placed in the rear seat of a blue Chevelle which pulled alongside. The Chevelle was driven by another man. The man with the gun got in the car and they all left the area. They drove through the Battery Tunnel to the Belt

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12 The case presented by appellant Contreras consisted of the recorded recollection of Hoyt Shead concerning the April 27th hijacking. He had no present recollection of the hijacking and was unable to testify (848-849).

Parkway and then to exit 37 on the Long Island Expressway. There, they turned around, drove back to Brooklyn and the drivers were released at about 7:30-8:00 am.

During the ride, the man with the gun inquired about the type of cargo; asked whether they picked up or delivered at the New York piers; stated that he attempted to hijack a United Merchants truck previously; and that they would drive around for two hours while the other guys loaded the truck. He stated that they had followed the truck across the Verrazano Bridge and commented that the load must have been quite heavy due to the speed the truck lost in climbing the bridge.

Also during the ride the man with the gun referred to the driver of the car as Tony.

Shead described the man with the gun as a white male, 40-45 years of age, six feet tall, weighing 230-235 pounds with a heavy build, having dark reddish hair and two small marks on the left side of his cheek.[13]

Shead described the driver of the car as a white male, 35 years of age, weighing 220 pounds, being clean shaven, and having a one and one half inch scar on the back of the right hand (849-854).

Appellant Contreras then offered to present evidence

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13 The description fit Tavolacci.

by his own testimony that he did not in April, 1973, have a one and one half inch scar on the back of his right hand. That was to be the extent of Contreras' direct testimony and because of this the Court was asked to limit the Government's cross-examination to the scope of the direct. The Court refused to do this and said:

> "If (he) takes the stand, he waives all of his rights. He will be subject to cross-examination in just the same way as any other witness is."

As a result of this ruling, Contreras declined to testify, but offered to display his right hand to the jury. The Court ruled that if he did so he would then be sworn and subjected to full cross-examination. Because of this ruling, Contreras declined to show his hand and thereafter rested his case.

JOSEPH DiGISO'S CASE

In 1973, Ray Barske, who was in the jewelry business at an auction met an individual known to him only as Jay. Jay asked Barske if he could use any dresses. Barske responded he could not but said he might be able to refer him to someone. Barske gave Jay, Bernard Mass's telephone number and then told Mass that he had done so. Jay was not appellant DiGiso.

Barske made this reference because he hoped to receive a finer's fee. (877-887.

ANDREW BERRADA'S CASE

Appellant Berrada offered to prove through the testimony of Thomas J. Hughes, a retired New York City detective and a

number of photographs that a truck crossing the Verrazano Bridge cannot be seen from 60th or 65th Street and the Brooklyn-Queens Expressway. The purpose of this evidence was to contradict Tavolacci's testimony concerning his observations.

The Court sustained the government's objection to the offer and the evidence was not admitted (895-903).

ISSUES PRESENTED

1. Where there is testimony given at the trial that a participant in a theft, allegedly Contreras, has a one and a half inch scar on the back of his right hand, did the court commit error by refusing to allow Contreras to display his right hand to the jury unless he were to be sworn in as a witness and subjected to cross-examination?

2. Where a juxtaposed full face and profile photograph display normally associated with a "mug shot" of Contreras is introduced into evidence over the objection of defense counsel, has error been committed?

3. Where a key government witness has testified that Contreras wore sunglasses at all times, did the court commit error by allowing said witness to testify that the photograph of Contreras had eyes that were similar to the eyes of a hijacker in a hijacking in which Contreras did not allegedly participate?

4. In a trial where one of the defendants was acquitted completely and one of the other defendants was acquitted of several of the counts of the indictment, did the totality of errors committed at the trial affect a substantial right of Contreras, necessitating a reversal of the conviction?

ARGUMENT

POINT I

THE DISTRICT COURT COMMITTED ERROR BY REFUSING TO ALLOW CONTRERAS TO DISPLAY HIS RIGHT HAND TO THE JURY WITHOUT BEING SWORN AND SUBJECTED TO CROSS-EXAMINATION

Witness Hoyt Shead, a driver of one of the trucks allegedly "hijacked" by Contreras and his associates, described one of the hijackers, allegedly Contreras, as having a one and a half inch scar on the back of his right hand. (849, 854).

Contreras offered to display his right hand to the jury to show that he had no such scar, but the district court ruled that if he did so he would have to be sworn as a witness and be subjected to full cross-examination. Contreras abided by this ruling and chose not to display his hand.

It is respectfully submitted that the district court committed error by refusing to allow Contreras to display his hand to the jury.

The Fifth Amendment of the United States Constitution does not, in its clause dealing with compulsory self-incrimination, prohibit the government from utilizing "non-testimonial" evidence seized from the person or body of a criminal defendant. In Schmerber v. California, 384 U.S. 757 (1966), the government was allowed to introduce into evidence an incriminatory analysis of the defendant's blood

taken without his permission, because such evidence was considered "non-testimonial".

Likewise, in United States v. Dionisio, 410 U.S. 1, (1973) the Supreme Court held that a person accused of a crime could not invoke the Fifth Amendment privilege against self-incrimination to prevent the government from obtaining a voice exemplar from the defendant and introducing said exemplar into evidence at trial.

United States v. McCarthy, 473 F.2d 300, 304 (CA2 1972) held that an accused could be required, on motion of the government, to display a tattoo to the jury when said tattoo played a role in the indentification of the accused, without in any way violating his privilege against self-incrimination.

If the government may be allowed to display a part of an accused's body to the jury in order to incriminate him, then surely an accused such as Contreras here may also be allowed to display his hand to the jury in order to exculpate himself, without surrendering his privilege against testimonial self-incrimination.

POINT II

THE DISTRICT COURT COMMITTED ERROR BY ALLOWING INTO EVIDENCE A "MUG-SHOT" PHOTOGTAPH OF CONTRERAS

During the course of the trial, a juxtaposed full face and profile photograph display of Contreras was admitted into evidence, over the objection of the defense counsel. Although this "mug-shot" had no visible markings on it, the association that the jury might well have made with mug shots seen in post offices, in movies, and on television may well have prejudiced Contreras, particularly in light of the fact that he chose not to testify and to rely on his presumption of innocence.

This Courhas been very wary concerning the introduction into evidence of the precise type of photograph used here:

> "Inasmuch as the jury may ihner from the nature of this type of photograph that a defendant has had problems with the law prior to his most recent arrest, the introduction of this sort of picture may in certain circumstances undermine the defendant's right to a fair trial." United States v. De Sena, 490 F.2d 692 at 696 (CA2 1973).

In De Sena, supra, it was held that the introduction of the mug shot did not constitute reversible error because of the overwhelming evidence against the defendant and the fact that there were no visible markings on the photograph. It is respectfully submitted that in the instant case there

was no such overwhelming evidence against Contreras (See Point IV of this Brief, infra).

Guidelines for the introduction of "mug-shot" photographs were laid down by this Court in United States v. Harrington, 490 F. 2d 487, at 494-495 (CA2 1973):

> "We perceive three prerequisites to a ruling that the introduction of 'mug-shot' type photographs does not result in reversible error:
>
> 1) The Government must have a demonstrable need to introduce the photographs; and
>
> 2) The photographs, themselves, if shown to the jury, must not imply that the defendant has a prior criminal record; and
>
> 3) The manner of introduction at trial must be such that it does not draw particular attention to the source or implications of the photographs."

It is respectfully submitted that the government failed to comply with any of the above three prerequisites and therefore the introduction of the photo spread of Contreras constituted reversible error.

1. There was no demonstrable need for the government to introduce the photograph. The witness Sam Brown merely testified that the eyes in the photograph of Contreras "resembled" the eyes of one of the hijackers. Furthermore the individual who the government claimed was Contreras wore sunglasses during the entire commission of the crime. For whatever that testimony might have been worth (See Point III of this Brief, infra), there was certainly no need to prejudice the jury by introducing a mug-shot type photograph of Contreras.

2. The photograph of Contreras, although not visibly marked, certainly implied to the jury that the defendant had a prior criminal record. The photograph that was introduced into evidence was a juxtaposed full face and profile photo display normally associated with a mug shot. Except for the absence of a prison number, the photograph was exactly the same as one would find in a "wanted" poster in a post office, or on television or in the movies.

3. The government drew particular attention to the source of the photograph by having the witness Sam Brown testify that he had examined the same photo spread when law enforcement officials were trying to ascertain the identity of the persons who had hijacked Mr. Brown's truck. Surely the jury could reasonably infer that the mug shot of Contreras came from the files of the F.B.I. or some other law enforcement agency.

As stated in Harrington, supra at 495, the preferable course of action is to avoid the use of the juxtaposed full face and profile photo display normally associated with "mug shots". It is respectfully submitted that the use of the mug shot in the instant case was prejudicial and constituted reversible error.

POINT III

THE DISTRICT COURT COMMITTED ERROR IN ALLOWING CONTRERAS THE WITNESS SAM BROWN TO IDENTIFY CONTRERAS BY HIS EYES IN VIEW OF THE FACT THAT SAID WITNESS TESTIFIED THAT HE WORE SUNGLASSES AT ALL TIMES.

The witness Sam Brown, a driver on two separate occasions of one of the hijacked trucks, testified that one of the persons participating in the first hijacking was referred to by the other participants as "Tony", which is the first name of Contreras. Mr. Brown further testified that he could not see "Tony's" face because Tony wore sunglasses at all times that he was in the presence of Mr. Brown. At the trial, Mr. Brown testified that the eyes portrayed in the "mug shot" of appellant resembled the eyes of one of the participants in the second hijacking. The inference that the prosecutor desired the jury to make was that the "Tony" who participated in the first hijacking was in fact Anthony Contreras[1]

It is respectfully submitted that the court violated Rule 602 of the Federal Rules of Evidence in allowing Mr. Brown to so testify, and thus committed reversible error.

Rule 602 states as follows: "A witness may not

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1 The government alleges that appellant participated in the first (May 7, 1973) hijacking, but not the second (May 29, 1973) hijacking. The inference the government wishes the jury to draw is that although Mr. Brown correctly indentifies appellant ("Tony") as one of the hijackers, the witness is mixed up as to which of the two hijackings appellant participated in.

testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." Such evidence may consist of the testimony of the witness himself.

Although the credibility of a witness is a queation of fact for the jury, the competency of a witness to testify as to certain matters is a question of law for the court.

By his own testimony, Mr. Brown established that he had no personal knowledge of the features of "Tony's" face because "Tony" wore sunglasses at all times and therefore Mr. Brown could not observe the particularities of his facial features, most importantly the characteristics of "Tony's" eyes. Therefore, it is submitted, Mr. Brown was incompetent to testify that the eyes in the mug shot of appellant "resembled" the eyes of one of the hijackers because of "the absence of a showing that the (witness) was giving an impression derived from the exercise of his own senses, not from the reports of others..." United States v. Borelli, 336 F.2d 376, 392 (2nd Cir. 1964), cert. denied sub nom. Mogavero v. United States, 379 U.S. 960 (1965).

The error in the Court's allowing Mr. Brown to compare the eyes of one of the hijackers in the May 29th hijacking with the eyes portrayed in the photograph of Contreras was compounded by the introduction of the mug shot into evidence. (See Point II of this brief, supra).

POINT IV

THE CUMULATIVE ERRORS AT THE TRIAL AFFECTED A SUBSTANTIAL RIGHT OF CONTRERAS PARTICULARLY IN VIEW OF THE CLOSENESS OF THE FACTUAL DISPUTES

There can be no doubt that the factual disputes at the instant trial were extremely close. One defendant (Dominici) was acquitted of all the charges, and another defendant (Berrada) was acquitted of several counts of the indictment. Contreras was never positively identified by any of the victims of the several thefts, but was convicted almost exclusively on the testimony of an accomplice-informer, Thomas Tavolacci.

Although Rule 103(a) of the Federal Rules of Evidence states that error may be the basis for a reversal on appeal only if it affected "a substantial right of a party", the totality of the errors and the closeness of the factual disputes require, it is respectfully submitted, a reversal as to Anthony Contreras.

"...Where the government's case involves close factual issues and its proof of an element of the crimes alleged leaves room for a reasonable inference inconsistent with guilt, we will scrutinize claimed error with particular care." United States v. Grunberger, 431 F.2d 1062, 1066-7 (CA2 1970).

POINT V

PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE (28(i) APPELLANT CONTRERAS ADOPTS THOSE POINTS AND ARGUMENTS ADVANCED BY HIS CO-APPELLANTS INSOFAR AS THEY ARE APPLICABLE TO HIM

CONCLUSION

The judgment appealed from must be reversed and the indictment dismissed or alternatively there must be a new trial.

Respectuflly submitted,

PAUL E. WARBURGH, JR.
Attorney for Appellant

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK
COUNTY OF New York } SS.:

Floristeane Anthony
being duly sworn, deposes and says; that deponent is not a party to the action, is over 18 years of age
~~xxxxxxxxxx~~

That on the 6th *day of* August *19*76

deponent served the within appellant's brief and joint appendix

upon Steven Kimmelman
Ass't United States Attorney
United States Courthouse
attorney(s) for ~~xxxxxxxxx~~ 225 Cadman Plaza East
Brooklyn, New York 11201

~~xxxxxxxxxxxx~~

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in – a post office – official depository under the exclusive care and custody of the United States post office department within New York State.

Floristeane Anthony

Sworn to before me,

this 6th *day of* August *19* 76

NOTARY PUBLIC, State of New York
No. 52-9502439
Qualified in Suffolk County
Commission Expires March 30, 19[illegible]